AMERICAN FOREST
RESOURCE COUNCIL

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October 24, 2007

Ed Shepard
Bureau of Land Management
Western Oregon Plan Revisions Office
333 SW 1st Avenue
Portland, OR 97204

Dear Mr. Shepard:

Please consider these comments of American Forest Resource Council in response to the Western Oregon Plan Revisions (WOPR). We intend to submit another letter with additional comments prior to the comment deadline.

AFRC represents nearly 80 forest product businesses and forest landowners in twelve western states. Our mission is to create a favorable operating environment for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions that determine or influence the management of all lands.

A. The BLM Must Develop a New WOPR Alternative that Avoids Jeopardy to the Spotted Owl without Creating Reserves to Contribute to Recovery of the Spotted Owl

BLM has a legal obligation under the O&C Act, the settlement agreement in *AFRC v. Norton*, Civ. No. 94-1031-TPJ, and Ninth Circuit case law to develop a new alternative for management of the O&C Lands under the Western Oregon Plan Revision ("WOPR") that avoids jeopardy to the northern spotted owl without creating any reserves or imposing other management constraints to contribute to the recovery of the owl, as the current WOPR alternatives provide. The WOPR draft EIS describes BLM's design of alternatives to provide for recovery:

> "The plans will also comply with all other applicable laws including, but not limited to the Endangered Species Act . . . . in accord with the Endangered Species Act, the plans will use the BLM's authorities for managing the lands it administers in the planning area to conserve habitat needed from these lands for the survival and recovery of the species listed as threatened or endangered under the Endangered Species Act."

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Draft EIS at 3-4.

Based on this rationale, which appears to be based on §7(a)(1) of the ESA, approximately 52% of the BLM suitable timberland base in Alternative 2 is dedicated to "late-successional management areas" that have as their principal purpose contributing to the recovery of the northern spotted owl. As explained in more detail below, the O&C Act requires the BLM to determine the suitability of timberlands on O&C Land for permanent forest production, and to manage all suitable timberlands for the dominant use of forest production. The WOPR rationale creating discretionary reserves for the recovery of the northern spotted owl effectively overrides the O & C Act, and renders it subservient to the ESA by limiting permanent forest production as necessary to meet ESA goals, including recovery.

An agency action may proceed under ESA § 7 so long as it is not likely to jeopardize the survival of the species or adversely modify critical habitat. AFRC believes that a WOPR alternative that avoids jeopardy without any discretionary contribution to recovery (a "no-jeopardy alternative") meets the § 7 standard, and is required to fulfill the O&C Act's statutory requirement to manage suitable timberlands for the dominant use of forest production. Because of BLM's O&C Act statutory responsibilities to manage O&C Lands for timber production as the dominant use, BLM as part of the consultation process should seek a biological opinion on a no-jeopardy alternative without an additional contribution to recovery, in addition to its current recovery based alternative.

B. BLM Must Manage O&C Lands for the Dominant Use of Forest Production.

AFRC believes an alternative that contains no reserves except to avoid jeopardy is required by the terms of the settlement agreement in *AFRC v. Norton*, Civ. No. 94-1031-TPJ. Paragraph 3.5 of the settlement agreement requires that for Resource Management Plan revisions "at least one alternative to be considered in each proposed revision will be an alternative which will not create any reserves on O&C Lands except as required to avoid jeopardy under the Endangered Species Act. All plan revisions shall be consistent with the O&C Act as interpreted by the Ninth Circuit Court of Appeals." The Ninth Circuit in *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174 (9th Cir. 1990) rejected an argument that the BLM had a duty to conserve the spotted owl. The settlement agreement requires that the BLM plan revisions be consistent with this opinion which interpreted the O&C Act. Specifically, plaintiffs asserted that BLM had a duty to manage the O&C Lands for "wildlife conservation, rather than for the dominant use of timber production." *Id.* at 1183. Plaintiff Headwaters argued that the phrase "forest production" in the O&C Act also included "conservation values such as preserving the habitat of the northern spotted owl." The Court concluded that "Headwater's proposed use – exempting certain timber resources from harvesting to serve as wildlife habitat – is inconsistent with the principle of sustained yield. As the statute clearly envisions sustained yield harvesting of O&C Act lands, we conclude that Headwater's construction is untenable. There is no indication that Congress intended 'forest' to mean anything beyond an aggregation of timber resources." Id. The Ninth Circuit concluded that "the O&C Act envisions timber production as the dominant use . . . nowhere does the legislative history suggest that wildlife habitat conservation or conservation of old growth forest is a goal on par with timber production, or

indeed that it is a goal of the O&C Act at all. The BLM did not err in construing the O&C Act as establishing timber production as the dominant use." *Id.* at 1184.

The listing of the spotted owl did not change the Ninth Circuit's view. In a petition for rehearing filed after the spotted owl was designated as a threatened species in June 1990, the Ninth Circuit declined to reconsider its opinion. *Headwaters v. BLM*, 940 F.2d 435 (9th Cir. 1991).

The Supreme Court in *National Association of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007) adds further support to the argument that nothing in the ESA compels BLM to select only those alternatives that conserve threatened and endangered wildlife. In *Homebuilders*, plaintiffs argued the EPA's decision to allow Arizona to administer the NPDES permit program under the Clean Water Act ("CWA"), involved the exercise of discretion about whether Arizona had met the criteria set forth in Section 402(b) of the CWA to shift administration to a state. Plaintiffs argued that "these criteria incorporate references to wildlife conservation that bring consideration of [ESA's] no-jeopardy mandate properly within the agency's discretion." 127 S. Ct. at 2537. Plaintiffs' argument is similar to an argument that the environmental groups made in the *Headwaters* case that BLM had discretion to consider the conservation of spotted owl under the O&C Act. The Supreme Court in *Homebuilders* concluded that "[t]he argument is unavailing. While the EPA may exercise some judgment in determining whether a state has demonstrated that it has the authority to carry out § 402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list. Nothing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application." *Id.* (Emphasis added).

Therefore, because, BLM's legal mandate under the O&C Act gives it no discretion to vary from its purpose of providing sustained yield of timber products for local communities, BLM has no obligation to protect species to the detriment of the O&C Act statutory purpose of sustained yield timber production. BLM certainly would be in full compliance with the ESA if BLM chose an alternative that resulted in no-jeopardy to endangered species with no additional measures for recovery. Therefore, AFRC strongly urges development of an alternative that does not provide for the conservation or recovery of the spotted owl but provides for no-jeopardy. Such an alternative is required by the settlement agreement.

C. The ESA does not Compel Agencies to Adopt Management Plans that Provide for Endangered Species Recovery.

A no-jeopardy alternative will not conflict with any duty imposed by the ESA because the ESA does not impose any recovery obligation. AFRC recognizes that the Ninth Circuit's decision in *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir.) *amended*, 387 F.3d 968 (2004) has introduced some perceived uncertainty as to whether a federal agency has a duty to undertake actions seeking to achieve recovery of listed species. *Gifford Pinchot* addresses the standards for determining under §7(a)(2) whether a proposed agency action is likely to result in the destruction or adverse modification of designated critical habitat. It establishes the principle that adverse modification determinations must

consider effects on the future recovery of the species. The court did not decide how recovery should be considered. The court left to FWS and NMFS to decide the geographic level to analyze such effects. The following conclusions can be drawn from *Gifford Pinchot*:

1. *Gifford Pinchot* has no application to federal agency actions that do not affect designated critical habitat, or where critical habitat has not been designated for a species. Recovery is an issue only when adverse modification is being determined, and adverse modification is a concern only where designated critical habitat may be affected.

2. The case does not address the standards for designating critical habitat. It did not hold that the FWS or NMFS are required to designate sufficient critical habitat to achieve recovery of a listed species. To the contrary, the ESA precludes designation of critical habitats if they are not in need of special management considerations or protection, or if the lands are managed by the Defense Department. Further, §4(b)(2) of the ESA allows the "exclusion" of any habitat area based on a comparative benefits analysis that considers economics or any other factor deemed relevant by the Secretary. The exclusion process is independent of impacts on recovery. The sole biological limit on the Secretary's discretion is that an exclusion may not "result in the extinction of the species concerned." Thus, areas meeting the definition of critical habitat in §3(5)(A) can be excluded from designated critical habitat regardless of the effect on the species' chances of recovery.

3. *Gifford Pinchot* does not hold that the ESA imposes a duty on federal agencies to undertake actions seeking to achieve recovery of endangered or threatened species. It imposes no affirmative duty at all on federal agencies.

> Courts have long recognized that a federal agency's recovery duties are found in §7(a)(1) of the ESA, which directs agencies to "utilize their authorities" to carry out species conservation programs. In *Defenders of Wildlife v. Martin*, - F.Supp.2d -, 2007 WL 641439 (E.D.Wash. 2007), the court rejected the argument that *Gifford Pinchot* imposed on federal agencies a duty to recover listed species:
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> > Plaintiffs argue that Defendants therefore have an affirmative duty not only to forestall the extinction of a species, but also to allow a species to recover to the point where it may be de-listed. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Svc.*, 378 F.3d 1059, 1070 (9th Cir.2004). ... Plaintiffs argue that Defendants' current focus is simply on maintaining the population of existing animals, and that this falls far short of the conservation mandate in § 7(a)(1).
> >
> > ...
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> > Defendants are correct in their assertion that § 7(a)(1) does not provide any mechanism for applying its very broad goals to particular circumstances involving particular species, and it does not mandate any particular actions, as opposed to § 7(a)(2) with its very specific consultation requirement. ...The case law is clear that Defendants are not required to perform any and/or all conservation

> measures recommended by Plaintiffs or anyone else, for that matter, even the expert agencies.

Defenders of Wildlife v. Martin, - F.Supp.2d -, 2007 WL 641439 (E.D.Wash. 2007).

Other courts have uniformly held that action agencies do not have any legal duty to implement recovery plans. *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir.1996); *Grand Canyon Trust v. Norton,* No. 04-CV-636PHXFJM, 2006 WL 167560 at *2-3 (D.Ariz.2006); *Nat'l Wildlife Fed'n v. Nat'l Park Service,* 669 F.Supp. 384 (D.Wyo.1987). The timing of an agency's voluntary recovery actions lies within its discretion and is not subject to review by the courts. *Conservation Northwest v. Kempthorne*, - F.Supp.2d -, 2007 WL 1847143 (W.D.Wash. 2007) (no jurisdiction to review claim of unreasonable agency delay in implementing grizzly bear recovery plan).

4. *Gifford Pinchot* leaves intact the rule that § 7(a)(1) of the ESA does not provide authority for an agency to take an action that is prohibited by another statute. *Platte River Whooping Crane Trust v. Fed. Energy Reg. Comm'n.*, 962 F.2d 27 (D.C. Cir.), *reh'ing denied,* 972 F.2d 1362 (D.C. Cir. 1992) (calling the contrary view "far-fetched"). In the *National Association of Homebuilders* case, the Supreme Court reversed a Ninth Circuit that had found such authority, and affirmed that §7(a)(2) of the ESA only applies to discretionary agency actions, and does not impose any duty on a federal agency that supersedes a non-discretionary duty imposed by another statute.

Thus, nothing in the ESA or in the *Gifford Pinchot* decision imposes on federal agencies an affirmative duty to undertake actions to recover listed species. *Gifford Pinchot* requires that adverse modification determinations during §7 consultations on proposed agency actions that may affect designated critical habitat must consider the effects that the proposed action will have on recovery of the listed species for which the critical habitat is designated.

If you have any questions regarding these comments, please contact Ross Mickey at 541-342-1892.

Sincerely,

Tom Partin
President